

CIVIL SERVICE ARBITRATION TRIBUNAL

RN 938

AWARD

Rashid Hossen - Ag. President
Said Hossenbux - Assessor
Philippe Noel Jeantou - Assessor

In the matter of:-

**Government Secondary School Teachers Union
(GSSTU)**

And

Ministry of Education and Human Resources

In presence of: Pay Research Bureau

The Honourable Prime Minister who was then also Minister of Civil Service and Administrative Reforms recommended that in accordance with **Section 82 (1) (f) of the Industrial Relations Act**, the present industrial dispute be referred to the Civil Service Arbitration Tribunal for arbitration. The point in dispute is:-

“Whether the post of Deans of Studies should be created as per the Pay Research Bureau hereafter referred as the PRB, report recommendations of June 2003, paragraph 27.53, and be backdated as from June 2003.”

In its Statement of Case the Union avers:-

“History.

In its report in June 2003, the Pay Research Bureau, hereafter referred to as the PRB, recommended the creation of a grade of Dean. Recruitment thereto was to be made by selection from among Education Officers possessing the qualification required to cross the Qualification Bar reckoning 15 years experience as Education Officer.

In its subsequent report on Errors and Omission, PRB recommended that the 15 years experience be brought down to 12 years.

One post with token provision was approved in the 2004-2005 Estimates pending the prescription of the scheme of service.

On various occasions the Ministry of Education and Human Resources and the Union had working sessions to frame out the scheme of service. This materialized and was ready in December 2005. Since then no move has been initiated to open the post.

Philosophy behind the creation of the post of Dean of Studies in the Ministry of Education and Human Resources.

As the Education sector is undergoing profound changes to meet the challenge of a mutating society, it is considered that Dean of Studies will justly pivot the loads created, on the one hand, by the new work culture in schools to revitalize teaching and learning process and, on the other hand, by the framing of pedagogical programmes for quality enhancement in students' and teachers' performance, both of which are imperative in the context of the World Class Education.

Financial implication.

As an initial workable measure it was proposed to create and fill 256 posts of Dean of Studies for the 64 State Secondary Schools at a rate of 4 Deans per school. Education Officers

reckoning at least 12 years experience are eligible to apply. The Union opines that the post will be filled mostly by Education Officers presently serving as Head of Departments in the State Secondary Schools. The financial implication turns around R4, 000,000/- per year, as detailed below.

Top salary drawn by an Education Officer	R27,200/-
Starting salary of a Dean	R30,000/-
Salary difference	R2,800/- monthly.
Extra cost per year for 256 deans	R(2,800 x 256 x 12) =R8,601,600/-

Savings on headship allowance:

Presently a Head of department is paid an allowance of R 960/- monthly for extra duties performed. With the introduction of Dean of studies who will take over the job of Heads of departments, a yearly saving of R (960 x 10 x 45 x 12) equals to R 5,184,000/- will result. This figure is based on an average of 10 Heads per school and on an average of 45 schools as some schools have less than 10 Heads while others have more than 10.

Therefore the total cost of implementation turns around R (8,601,600 – 5,184,000) = R 3,417,000, approximated to **R 4,000,000/-**

Calendar of events.

1. **15 August 2005.** The Union gave notice of an Industrial dispute in favour of Education Officers posted in State Secondary Schools. The issue of the dispute was the post of Dean of Studies. **Letter 3.**
2. **06 September 2006.** The Honourable Prime Minister and Minister of Civil Service and Administrative Reforms recommended a settlement of the dispute in accordance with section 82 (1) b of the Industrial Relations Act. **Letter 5.**
3. **13 September and 20 September 2006.** Two meetings were held in that connection and copies of minutes are attached herein. **Letter 1 and letter 2. Also please refer to**

notes below concerning meetings between parties concerned.

4. **06 October 2006**. The Union was asked to inform the Ministry of Civil Service and Administrative Reforms as to whether the dispute was to be maintained. **Letter 4. Ref 2/439/27/03/02/01.**
5. **06 October 2006**. The Union replied that it was maintaining the dispute. **Letter 6.**
6. **18 October 2006**. The Ministry of Civil Service and Administrative Reforms informed the Union that the Hon. Prime Minister and Minister of Civil Service and Administrative Reforms had referred the industrial dispute to the Civil Service Arbitration Tribunal for arbitration. **Letter 7.**
7. **27 October 2006**. In response to above the Union was called upon to attend the Civil Service Arbitration Tribunal on 8 November 2006. **Letter 8.**

Meetings between parties concerned with the dispute.

Parties involved:

1. Ministry of Civil Service and Administrative Reforms
2. Ministry of Education and Human Resources
3. Ministry of Finance
4. Government Secondary School Teachers Union.

A first meeting was held on Wednesday 13 September 2006 in the Conference room of the Ministry of Education and Human Resources.

Please find attached a copy of the minutes of that meeting.

Because the representative of the Ministry of Finance could not convey the opinion of the Financial Secretary on the financial implication, he was requested by the Chairman to convey the stand in the next meeting scheduled for Wednesday 20 September 2006.

During this second meeting representative of the Ministry of Finance did not turn up. Therefore there was a dead lock concerning the industrial dispute following which this has been referred to the Tribunal for settlement.

Contract/option form.

At the material point in time when Education Officers signed the option form to express their agreement to accept the PRB report in 2003 they did so with full knowledge of its implications and recommendations. The report was agreed by Government and therefore had to be implemented in toto. The delay to implement the recommendation of Dean since 2003 and the present refusal of Government to implement same is a clear indication of a breach of contract on part of Government.

The Union humbly pleads to the Civil Service Arbitration Tribunal for a favorable settlement of the dispute to honour the contract already signed by Education Officers with the Government of the Republic of Mauritius.”

The Respondent in its Statement of Case avers:-

“Section 1 – History

The Respondent admits Paragraph 1 of the Applicant’s Statement of Case, except that in the report “Errors, Omissions and Clarifications” of the 2003 PRB report, the PRB has recommended that with effect from 01 July 2008, recruitment to the grade of Dean should be made from among Education Officers possessing the Post Graduate Certificate in Education or an alternative qualification in the field of Education.

The Respondent admits Paragraph 2 and 3 of the Applicant’s Statement of Case.

As regards Paragraph 4 of the Applicant’s Statement of Case, the Respondent effectively had consultations with the Government Secondary School Teachers Union during the process of the prescription of the scheme of service. The scheme of service was prescribed on 20 April 2005. Thereafter, the Respondent started consultation with the Ministry of Finance and Economic Development for funds to

fill 256 posts of Dean and for a consequential recruitment of 176 Education Officers.

Section 2 – Philosophy behind the creation of the post of Dean

Respondent admits Section 2 of the Applicant's Statement of Case.

Section 3 – Financial implication/Savings on headship allowance

The Respondent avers that in order to implement the recommendation as stated in the PRB Report, the Ministry would need a total of 256 Deans. Since the Deans will teach for only 10 periods weekly instead of 28, there would be need for a consequential recruitment of 176 Education Officers to cover the remaining teaching periods.

The Respondent further avers that though it is agreed that funds to meet the salary of Education Officers promoted Dean, partly offset by savings which would result from the non-payment of the allowance to Heads of Department might turn out to be around Rs 4 M yearly, the Ministry would require additional funds to the tune of Rs 32.5M (i.e. 176 x Rs 14,200 (salary of Education Officers) x 13) to meet the salary of Education Officers to be consequently recruited bringing the total yearly funding to Rs 36.5M. This amount does not include, travelling allowance, interest on car loan, duty free remission, etc. However, the Ministry of Finance, owing to the difficult economic situation of the country, is not in a position to provide the required amount of funds to concretise the recruitment of Deans in the schools. The Ministry of Finance has instead requested the Ministry to operate within the Expenditure Ceiling allocated for Financial Year 2006/2007 and cost effectively implement and prioritise its projects and programmes so as to ensure efficiency gains and generate savings to offset the costs of the recruitment of Deans. The suggestion of the Ministry have been thoroughly examined and it has been found that it would not be possible for the Ministry

to generate savings as the Ministry has been allocated a very tight budget.

Section 4 – Calendar of events

Respondent admits Paragraph 1 of Section 4 of Applicant's Statement of Case.

As regards Paragraph 2 of Section 4 of Applicant's Statement of Case, the Prime Minister and Minister of Civil Service & AR recommended that a meeting be convened with the GSSTU for further discussions with a view to promoting a settlement of the Dispute.

Respondent admits Paragraph 3 of Section 4 of Applicant's Statement of Case.

Respondent is not aware of paragraphs 4 and 5 of Section 4 of Applicant's Statement of Case.

As regards Paragraph 6, the Ministry of Civil Service & AR informed the Respondent.

Respondent admits Paragraph 7 of Applicant's Statement of Case.

Section 5 – Meetings between parties

Respondent admits Paragraphs 1 and 2 of Section 5 of Applicant's Statement of Case.

As regards paragraph 3, the representative of the Ministry of Finance informed that being aware of the difficult situation of the country, he could not take any commitment on behalf of the

Ministry of Finance as regards the provision of funds. He was requested to take up the matter with the Financial Secretary for the release of the necessary funds so that the post could be filled and the dispute settled.

Respondent admits paragraph 4 of Applicant's Statement of Case and avers that subsequently on 22 September 2006 the Ministry of Finance requested the Respondent to operate within the Expenditure Ceiling allocated for Financial Year 2006/2007 and cost effectively implement and prioritise its projects and programmes so as to ensure efficiency gains and generate savings to offset the costs of the recruitment of Deans.

Section 6 – Contract/option form

It is a fact that Education Officers have opted to accept the revised emoluments and terms and conditions of service as set out in the PRB Report 2003. However, the Ministry is unable to fill the posts of Dean because, in view of the difficult economic situation of the country, the Ministry of Finance has not provided the required funds to the Respondent. Consequently, the Respondent is re-examining the Dean scheme so as to find ways and means for the functions intended to be attended to by the Deans to be taken care of in a most economical manner. The Ministry therefore recommends that the dispute be set aside on grounds of economic circumstances.”

The Pay Research Bureau, in whose presence this matter was being heard, put in a Statement of Case explaining its stand:-

1. Respondent No. 2 avers that it is an independent institution which carries an overall review on pay and grading structures and conditions of service of the employees in the public sector, normally five years.

2. Respondent No 2 which is an authority in matters relating to pay also provides advisory services as far as structures and creation of new levels of service are concerned.

3. Following submissions made in the context of the 2003 PRB Report by the then Responsible Officer of the Ministry of Education, Respondent No 2 recommended the creation of the post of Dean. The qualification requirements, the function and responsibilities of that post have been outlined at paragraphs 27.52, 27.53, 27.54 and 27.55 of the 2003 PRB Report Volume II. (Annex I).

4. After a PRB Report has been approved for implementation, the onus rests with the Responsible Officer for filling the vacancies in a new grade or in an existing grade according to needs of the organization. Respondent No. 2 avers that it has no say, in matters relating to the filling of vacancies.

5. Respondent No.2 avers that the Responsible Officer of Respondent No. 1 has recently made submissions on the work organization at various levels in the secondary education and those submissions have a bearing on the grade of Dean.

6. The staff side has made representations, among others, on the delay in filling of vacancies in the grade of Dean and the union representatives were informed that Respondent No.2 cannot intervene on this issue as the filling of vacancies is a matter of implementation which does not fall under the purview of the PRB.

7. Furthermore, Respondent No.2 had organized a meeting on 14 February 2008 with the staff union of the Education Sector (Secondary), amongst others, the Government Secondary School Teachers Union (GSSTU) in presence of Mr Gopee, the Applicant and the Responsible Officer of the Ministry of Education and Human Resources, wherein options as regards the structure of the Education Officer Cadre was discussed. The options may have a bearing on the grade of Dean.

8. At this stage, it is premature for Respondent No.2 to expatiate on what will be the outcome in the next PRB Report.

Testimonial and Documentary Evidence

Mr Naraindranath Gopee, Education Officer, testified on behalf of the Applicant. He first confirmed the averments contained in the Union's Statement of Case. According to him, there have been a number of meetings between the Union and the Ministry of Education and Human Resources. He

also confirmed the various minutes of proceedings produced as being the correct ones. The relevant and substantive parts of his testimony are as follows:-

- What is required is 256 posts of Dean of Studies to be filled and that inevitably will entail certain financial consequences.
- The post of Dean of Studies is mainly to be filled by Senior Officers who draw their top salary which amounts to Rs 27,200 per month and the starting salary of a Dean of Studies is Rs 30,000 per month, which makes only a difference of Rs 2,800 and the cost to implement the whole project of 256 Deans comes to Rs 2,800 per month times 256 Deans in post times 12 for one year which makes it to Rs 8,601,600. Those Heads of Department promoted to the job will no longer be Heads of Department and this will bring about a saving of Rs 960 which is the sum paid to Heads of Department by virtue of their responsibilities. It is the allowance for the Head of Department with an average of 10 Heads per school.
- On an average of 45 schools in the country times 12 for one year, it comes to Rs 5,184,000 as savings for the Ministry and when this is subtracted from the anticipated cost for the implementation of Rs 8,601,000, the difference is Rs 4 M which will be required to fill up the posts.
- The budget allocated to the Ministry of Education for the year 2006-2007 is to the tune of Rs 6.9 billion and for the year 2007-2008, it is Rs 7.3 billion.
- The criterion of the posts of Dean will represent some 5% (Rs 36.5 M) of the whole budget.
- The posts would not require 176 Education Officers because Heads of Department promoted to Deans will have to work 10 periods. They are

allocated 25 periods per week and 15 periods will have to be taken by Education Officers to be recruited to fill the posts. The number of Dean of Studies should be 128.

- The witness referred to Document C, confirming that the Ministry has always given the Union a helping hand to implement the project. The relevant part of that document, at paragraph 5, reads:-

“The Dean Scheme as recommended in the PRB Report in fact emanated from the Ministry of Education which after very in-depth considerations did so recommend to the PRB being firmly convinced that that scheme would be the appropriate instrument to enhance the quality of Education.”

- The figures of the Ministry and those of the Union appear to fluctuate.

The witness agreed to the following in cross-examination:-

- Deans will be recruited by selection from amongst officers in the grade of Education Officers reckoning at least 12 years service in a substantive capacity in the grade.
- An Officer with 12 years service cannot earn Rs 27,200 per month.
- To reach the top salary of Rs 27,200 per month, he will probably need more than 20 years service.
- The 13th month bonus has to be included in the calculation as he missed the 13th month.
- The post of Head of Department is not an established post and Heads of Department only draw an allowance for assuming the overall responsibility of a department.
- Some officers may have 5 years service and assume the responsibility.

- Some Heads of Department will not necessarily be appointed Dean given that the mode of appointment is given by selection.
- There will be a need for consequential recruitment of Education Officers to cover the remaining teaching period.
- The Ministry is in a better position to explain the recruitment of 176 Education Officers instead of 128.
- The Union's figures exclude salary compensation and sick leave, travelling allowance, duty-free facilities are not included.
- The Rs 36.5 M may reach Rs 40 M.
- The Ministry of Finance requested the Ministry of Education which started the whole process of creating the grade of Dean to postpone the recruitment exercise and to review the number of Deans proposed per school.
- Recommendations of the PRB become binding on the Government of the day.

The Respondent's witness Mrs Shakuntala Nuckchady deponed as follows:-

- She affirmed as to the correctness of the Ministry's Statement of Case.
- The cost of implementing the project is Rs 36.5 M.
- The appointment of 256 Deans with 3 increments leads to the figure of Rs 9,318,000 – Rs 2,800 being 3 increments payable on promotion x 13. This excludes the cost of benefits.
- 176 Education Officers will cost Rs 32.5 M when multiplied by 13 and this excludes salary compensation.

- Rs 36.5 M become Rs 42 M yearly when the benefits are included.
- The Ministry of Education was asked to implement the project in a cost effective manner and it is still examining the project.

In cross-examination, the witness stated that Education Officers are recruited with an academic degree and are requested to attend the course of post graduate course in education at the Mauritius Institute of Education after the latter is advertised and a selection taking place.

- There are Education Officers who refuse to follow that course.
- There are different qualifications under the scheme.
- The 3 increments are a one-off payment.
- An Education Officer who has not been promoted will be stuck at Rs 27,200 and one who has been promoted will get the chance of moving up to Rs 30,000 and with Rs 28,000 one gets other benefits like travelling and duty-free facilities.
- Representation for the creation of the post of Dean of Studies was made by the Ministry of Education to the PRB.
- When the post was recommended by the PRB, one token post was created, pending prescription of the scheme and when that was prescribed in June 2005, the Ministry made a request for the creation of additional posts and for funds.
- The funds were not approved.

The PRB was represented by Mr Appana Nagamah, Job Analyst. He affirmed as to the correctness of the PRB's Statement of Case. According to his deposition, the PRB is an authority as regards pay and it only acts as an

advisory body as far as structure and new levels are concerned. The proposal for the post of Dean came from the Ministry of Education and after discussion the PRB concurred with the proposal of the Ministry.

COUNSEL'S SUBMISSIONS

Mr Servansingh for the Applicant submitted that in making its Award the Tribunal shall have to consider some established and specific principles listed down in **Section 47 of the Industrial Relations Act**. The one that is most relevant to this case is **paragraph (1)** which invites the Tribunal to consider the interests of the persons immediately concerned and the community as a whole. There is also the **second paragraph** which refers to the principles and practices of good industrial relations and **paragraph (d)** which speaks of the need to ensure the continued ability of the Government to finance development programmes and recurrent expenditure in the public sector. Representations were made by the Ministry of Education and Human Resources to the PRB for the creation of the post of Dean of Studies. The PRB acceded to that request. The Respondent has established a valid and binding contract between itself and the Applicant. The employees have opted to be bound by the contract.

Counsel further submitted that the Government has to act responsibly under its contractual obligations and in failing to do so, it sent the wrong signal to the trade unions in the civil service and other sectors. Government back-pedal on the issue of lack of funds. It can only be a defence if it amounts to a frustration or a case of *force majeure* for reasons external to that party, so that it finds itself in the impossibility of executing its obligations for reasons beyond its control.

Mr Oozeer of the State Law Office for the Respondent, on the other hand submitted that there are two aspects to the PRB Report. One aspect to do with salaries and terms and conditions of employees on the other one would be certain recommendations as regards the creation of posts or their abolition. Before one decides whether the PRB Report in toto constitutes a binding contract because the employees have signed the option forms, there is a distinction to be made between salaries and terms and conditions of employment on the one hand and on the other hand recommendations for the creation of posts or their abolition which recommendations are directed not towards the employees but towards the Ministries which are responsible for the implementation as the recommendations. As such this cannot be considered as a condition of employment and one cannot therefore conclude that the PRB Report in toto including its recommendations regarding the creation or abolition of posts to constitute a binding contract between employees and the Government. Once Cabinet has given its approval to the report the offer is made to the employees who would elect to sign the option form. This would create a binding contract between the employees and the Government as regards salaries and terms of conditions.

Counsel further submitted the creation of posts are established under the Civil Establishment Act and the President is vested with the power pursuant to **Section 74 of the Constitution** to established posts in the public service and there are procedures to be followed and eventually it is the Public Service Commission which is empowered to make appointments.

TRIBUNAL'S CONSIDERATIONS

It is not disputed that it was at the request of the Respondent that is the Ministry of Education and Human Resources which made representations to the

Pay Research Bureau to consider recommending the creation of the post for Dean of Studies.

The Pay Research Bureau in its report of 2003 acceded to such request.

The Respondent is still finding ways and means of implementing the project save that its immediate application is being impeded due to a lack of funds.

It is further not disputed that the Respondent depends on the Ministry of Finance for funds. The latter requested the Respondent to postpone the recruitment exercise and to review the number of Deans per school.

The Respondent invoked in its Statement of Case and before Tribunal that lack of funds prohibits the immediate implementation of the project. We agree with Mr Servansingh, Applicant's Counsel that the Respondent's witness cut a poor figure in the box in attempting to substantiate the issue of lack of funds.

However, we consider that although there is a binding contract between the Government of Mauritius and the public officer who opted "*in conformity with the Circular Note, to accept the revised emoluments and terms and conditions of service as set out in the Report*", the enforcement of a recommendation to create posts must be taken in line with the principles laid down in **Section 47 of the Industrial Relations Act 1973**, as amended:-

“47 Principles to be applied

Where any matter is before the Tribunal, the Commission or the Board, the Tribunal, the Commission or the Board shall, in the exercise of their functions under this Act, have regard, inter alia, to –

- (a) The interests of the persons immediately concerned and the community as a whole;*
- (b) The principles and practices of good industrial relations; and*
- (c) The need for –*
 - (i) Mauritius to maintain a favourable balance of trade and balance of payments;*
 - (ii) to ensure the continued ability of the Government to finance development programmes and recurrent expenditure in the public sector;*
 - (iii) to increase the rate of economic growth and to provide greater employment opportunities;*
 - (iv) to preserve and promote the competitive position of local products in overseas market;*
 - (v) to develop schemes for payment by results, and so far as possible to relate increased remuneration to increased labour productivity;*
 - (vi) to prevent gains in the wages of employees from being adversely affected by price increases;*
 - (vii) to establish and maintain reasonable differentials in rewards between different categories of skills and levels of responsibility; and*
 - (viii) the need to maintain a fair relation between the income of different sectors in the community.”*

Curiously, **paragraph 3 (a) in the Option Form** makes no reference to ‘recommendation’. No doubt the Tribunal shall in the exercise of its functions under the Industrial Relations Act have regard to the interests of the

Government, the public officers and that of the community. The Respondent is unable to fill the posts of Dean of Studies because the required funds have not been provided by the Ministry of Finance. True it is that the Ministry of Education finds itself in a situation whereby it started something it cannot stop.

It is our view that once the public officers signed the approved PRB report, a “*contrat d’adhésion*” exists between the parties.

We find in **François Terré “Droit Civil, Les Obligations 7th Edition (Précis Dalloz) P 181, para. 188:**

“Le Contrat d’adhésion

Définition – *A l’époque du code civil, les contractants étaient principalement des particuliers traitant entre eux en cette qualité, et à égalité. Certes, il n’y a jamais eu une égalité absolue, une égalité économique entre parties; on a toujours connu des forts et des faibles, mais la disproportion des forces n’était pas écrasante. A l’époque actuelle, beaucoup de conventions sont conclues entre des professionnels et des particuliers. Or, par suite du développement et de la concentration des entreprises, ces groupements ont acquis une puissance les mettant en mesure d’imposer leur volonté à leurs cocontractants. L’égalité juridique recouvre une inégalité économique. Les modalités de formation des contrats s’en trouvent, bien souvent, profondément affectées. Ainsi, une puissante société ne discutera pas avec un salarié isolé les conditions de son contrat de travail et prétendra lui appliquer un règlement élaboré à l’avance par elle seule. De même, les clients des grandes entreprises subiront la loi de celles-ci: on ne discute*

pas avec la S.N.C.F. ou une compagnie d'aviation; on discute peu avec une compagnie d'assurances; les tractations sont réduites au strict minimum, puisque ces compagnies sont fortes d'un règlement auquel le client se contentera d'adhérer, dès lors qu'il choisit de ne pas s'abstenir.

Afin de designer cette réalité, on parle, à la suite de Saleilles, de contrat d'adhésion: le contenu du contrat n'est pas le résultat de la libre discussion de deux parties placées sur un pied d'égalité; il a été rédigé à l'avance et ne varie pas par l'une des parties qui, plus puissante économiquement ou socialement, le propose à l'adhésion de ses multiples cocontractants.

Si l'on essaie, au-delà des divergences doctrinales, de préciser la notion, trois traits sont généralement relevés:

- *Le contrat d'adhésion suppose entre les deux contractants une inégalité économique et sociale, telle que l'un d'eux est plus ou moins maître des biens ou des services que l'autre peut désirer.*
- *L'offre de contrat est adressée non à une personne déterminée mais au public en général, ou à une fraction de celui-ci dans les mêmes termes: ce sera la proposition d'un transport pour tous ceux qui veulent utiliser telle ligne de chemin de fer, telle ligne aérienne, tel navire, la proposition d'assurance d'un certain type, ou encore la proposition établie pour les abonnés du gaz ou de l'électricité.*
- *Le contrat est l'œuvre exclusive d'une des parties. Ayant la responsabilité de la marche de l'entreprise, celle-ci rédige seule les conditions du contrat, lesquelles doivent être semblables pour tous. L'organisation technique complexe de l'entreprise, les conditions générales de son fonctionnement excluent une discussion individuelle entre celle-ci et ses clients.*

Le législateur et la jurisprudence se sont maintes fois émus des abus auxquels ces contrats ont donné lieu. La détection de ces abus, les

moyens d'y remédier impliquent la détermination préalable de la nature juridique des contrats d'adhésion."

We further note in **“Leçons De Droit Civil Tome II/Premier Volume – Obligations théorie générale, 8^{ème} Edition par François Chabas:-**

87 - Imprécision de la classification – *La doctrine classique n'envisage le contrat que comme l'accord auquel sont parvenus deux parties traitant à égalité, de gré à gré. Mais dans la pratique, cette égalité et cette possibilité de libre discussion se rencontrent rarement. De nombreux produits sont vendus à des tarifs imposés par le fabricant; les grands magasins fixent des prix qui ne sauraient être débattus; il est difficile pour un particulier de discuter les conditions d'un contrat d'assurance, impossible pour un ouvrier isolé de faire modifier les conditions de travail imposés par l'entreprise, pour un particulier le prix ou les clauses de transport qu'il conclut avec une compagnie ferroviaire, maritime ou aérienne.*

Frappées de l'opposition entre le contrat de gré a gré et toutes ces situations, certains auteurs ont forgé pour les qualifier un mot qui a fait fortune: le contrat d'adhésion. On a même voulu rapprocher le contrat d'adhésion de l'institution du droit public, en soulignant que la volonté était, d'un côté, absente.

Ce n'est pas tout à fait exact. L'individu garde la possibilité de ne pas contracter, s'il contracte, c'est qu'il le veut; sans doute n'a-t-il pas la faculté de discuter, mais le contrat n'implique pas nécessairement une libre et égale discussion. En effet, l'égalité économique ou psychologique est impossible à réaliser: tel sera pressé d'acheter, alors que l'autre n'aura pas besoin de vendre; le plus fort, ou le plus rusé, triomphera nécessairement. Le passage est insensible du contrat de gré à gré au contrat d'adhésion, et toute classification apparaît délicate.

88 - Intérêt de la classification _ L'équilibre qui existe entre les situations des futures contractants, dispense le législateur d'intervenir dans la formation du contrat de gré à gré. Quant aux tribunaux, ils n'ont qu'à déceler la volonté commune des parties.

Lorsqu'il s'agit des contrats d'adhésion, l'intervention du législateur est, au contraire, nécessaire, au moins quand, par un monopole de fait ou de droit, le contractant qui dicte sa volonté, ne trouve plus de frein dans la loi de la libre concurrence. Le législateur doit alors briser les ententes ou trusts dangereux pour les consommateurs, fixer impérativement les conditions des contrats, les tarifs. C'est ainsi qu'il a interdit ou atténué les clauses de non-responsabilité dans le transport, réglementé impérativement le contrat d'assurance, l'équilibre est alors rétabli dans le contrat par la suppression ou la diminution de l'une et l'autre volonté.

L'interprétation que les tribunaux donnent du contrat d'adhésion est, par la force des choses, très particulière. Il n'est pas possible d'interpréter une volonté commune, puisque cette volonté n'existe pas. L'action de la jurisprudence s'exerce en suppléant dans le contrat des clauses qui n'auraient pas été acceptées par le plus fort, mais qui protègent le plus faible; on peut citer l'obligation de sécurité que les tribunaux <<découvrent>> dans de nombreux contrats d'adhésion.

125 - Restrictions lors de la formation du contrat – Il suffit de rappeler les dispositions impératives qui imposent les cadres de certains contrats. Le contrat de travail est, dans toutes ses dispositions, soumis aux conditions définies par les conventions collectives et par le législateur. La détermination des loyers, celle des charges des locataires, la durée minimale des baux sont impérativement fixées et changent au gré des majorités politiques. L'ordonnance du 17 octobre 1945 a établi un <<Statut juridique du fermage>>. Ainsi le contrat, dans lequel les clauses laissées à l'initiative des parties sont de moins en moins nombreuses, devant un statut, un contrat-règlement. Mais une transaction entre

cette formule autoritaire et celle de la pure et simple autonomie de la volonté est obtenue lorsque le législateur se borne à lutter contre les <<clauses abusive>> des contrats d'adhésion, par exemple en les réputant non écrites. A l'inverse, les textes nouveaux sur la protection du consommateur prescrivent souvent l'insertion de clauses non seulement dans un dessein de formalisme ou d'information, mais avec l'intention d'imposer des obligations nouvelles ou professionnel.

La jurisprudence a parfois introduit de force dans le contrat – notamment dans les contrats d'adhésion, afin de rétablir l'égalité entre les contractants, des obligations qui n'étaient pas voulues par les parties. On assiste à un <<forcement>> du contrat par le juge. C'est ainsi que, dans beaucoup de contrats, par exemple le transport de personnes, la jurisprudence impose une obligation de sécurité à la charge de l'une des parties."

Further more in contrats d'adhésion **DROIT CIVIL –Deuxième année par Yvaine Buffelan-Ianore** the author writes:-

"Il s'agit quand même de contrats, car l'intéressé reste libre de ne pas contracter s'il ne veut pas accepter les conditions qui lui sont proposées. Mais le législateur et la jurisprudence se réservent le droit de contrôler ces contrats et de les interpréter à l'avantage du plus faible." (See also, **V. Jeetoo V. The MTC & OS SCJ 216 of 2007**).

In the same breath, we refer here to what was held, inter alia, in **Federation of Civil Service Unions v/s The State of Mauritius SCJ 298 of 1998:-**

"First, it is clear from the facts of the present case that the public duty cast on the respondent to pay the salary

compensation accruing as from 1 July 1998 is not rooted in statute but in contract, as rightly observed by learned Counsel for the respondent, so that the non-performance of this contractual obligation is not actionable by the public law remedy of mandamus. The applicant has a more appropriate alternative remedy in private law or in having recourse to other avenues under the Industrial Relations Act.”

But can the Tribunal, by virtue of the provisions under the Industrial Relations Act order for the enforcement of a recommendation to create posts laid down in a “*contrat d’adhesion?*” We are inclined to accept the submission of Mr Oozeer of the State Law Office to the effect that there is a distinction between salaries and terms and conditions of employment on the one hand and on the other hand, recommendations for the creation of posts which recommendations are directed not towards the employees but towards Ministries which are responsible for the implementation of such recommendations. The Supreme Court, in an interrogative manner asked in **The Government General Services Union v. Mr Harris Balgobin and Ors (SCJ 338 of 1994):-**

“If, as appears to be the case, it can be shown that every public officer who is a member of the applicant has, for over a year now, signed an irrevocable option form accepting the relevant salary provided for in the report of the Bureau, what would be the applicant’s locus standi in the matter?”

It remains to be answered whether the contract is between the Union and the Government of Mauritius.

In the present matter, we have not been addressed by any party on whether a Union can bring an action on behalf of public officers who signed the Form opting for the PRB report. Even if we were to assume that such may be

the case, this dispute has been referred to us by virtue of a letter dated 18th October, 2006 emanating from the Ministry of Civil Service and Administrative Reforms as a dispute between The Union and The Ministry of Education and Human Resources. As laid down in **“The Government General Services Union v. Mr Harris Balgobin (supra),**

“Neither a Minister, nor a Ministry, is an employer, and it is for the Government not the Tribunal to determine how and by whom it should be represented.”

The Industrial Relations Act 1973 as amended makes provisions for the settlement of disputes between “employee” and “employer” in matters of industrial relations.

It is also our view that a party that claims a breach of contract would presumably ask for damages for breach of contract and/or for an order of mandamus/certiorari which are matters to be dealt with before the Supreme Court. Indeed, when one looks at the Statement of Case of the Applicant in the present matter, it is clear that the Union was treading, rightly or wrongly, on the premises that their action lies in contract for a “breach of contract”:- *“The delay to implement same is a clear indication of a breach of contract on part of Government.”* However, we note that the Union is only asking for the implementation of the post of Dean of Studies in the Terms of Reference regarding the particular dispute. This appears to us to be more a case in the nature of a mandamus application.

The dispute is accordingly set aside.

Rashid Hossen
(Ag. President)

Said Hossenbux
(Assessor)

Philippe Noel Jeantou
(Assessor)

Date: 30th December, 2008